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Supreme Court of the United States

OCTOBER TERM, 1942
No. 268

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased,

PETITIONER,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY, a corporation,

RESPONDENT.

In the Matter of Anna L. Harris, Debtor, Since Deceased On Writ of Certiorari to the United States Circuit Court of Appeals, Tenth Circuit

RESPONDENT'S BRIEF

HADLOND P. THOMAS,
Counsel for Respondent,
Salt Lake City, Utah.

DANIEL H. THOMAS and
THOMAS & THOMAS
Of Counsel.

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RESPONDENT'S BRIEF

FOREWORD

This farmer-debtor case has now visited in all the courts of the land, state and federal.

It commenced in bankruptcy (under §75) in the United States District Court of Utah. It then journeyed to the Utah probate court, thence to the state supreme court, and from there to this Honorable United States Supreme Court which first granted certiorari but on argument dismissed.

It then had rebirth in the Federal District Court, journeyed hence to the 10th Circuit Court of Appeals, and is now revisiting in this Honorable Court.

Outwardly, by its title, it has varied according to the court where it was visiting. But inwardly it has always been the same. Upon the merits it has never changed.

Again and again this case has been briefed. But on the merits the briefs have always been the same.

We know of nothing to be added. Consequently as its brief here, respondent submits its brief below where it was appellee in the Circuit Court of Appeals. That brief follows and is bound herein.

Note, however:

I.

We are trying on this appeal *only* the final order of the Federal District Court made September 30, 1941,—

(a) vacating an earlier order of revivor reviving the bankruptcy proceedings;

(b) dismissing the administrator's prior petition for that revivor;

(c) ordering (for the second time) that an *amended* petition by the administrator under subsection (s) not be filed.

Let there be no mistake. Nothing else is here on trial. **(9-11 infra).**

II.

The administrator claims the right, absolute, to enter into bankruptcy regardless of the refusal of the probate court (his true proprietor apart from whom he cannot exist) to give consent.

That he is the simple arm and instrument of that state court—no more—and has no separate independent autonomy, is clear again for since the judgment below the Supreme Court of Utah has said (October 26, 1942):

> "The court is the guardian of the estate. An administrator or executor simply acts under its orders." In re Stevens' Estate, 130 P. (2d) 85, 87 (Utah).

This accords precisely with the views of this Honorable Court itself (since the judgment below) respecting another species of state creatures:—*Municipalities.*

> "It (the municipality) is wholly subordinate to the unrestrained power of the state over political subdivisions of its own creation.". (Parentheses added) Faitoute Iron & Steel Co. vs. City of Asbury Park, 62 S. Ct. 1129, 1133.

Continuing:

> "A municipal corporation . . . is a representative not only of the State, but is a portion of its governmental power. . . . The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may *enlarge* or *contract* its powers or *destroy its existence*'." *Id.*

If a municipality is only a portion of the state's governmental power, so also is a probate court. Likewise, the administrator who is only the bare creature or instrument of that court.

Powers of cities may be enlarged or contracted by the state. And so may the powers of state probate courts and their administrators no less.

Municipalities may even be abolished altogether by the state. Likewise the probate courts. And their aboli-

tion makes extinct their instrumentality—the administrator. And his extinction would leave no administrator to whom the particular bankruptcy act might apply. Thus Congress would be left powerless to enforce this bankruptcy act regarding administrators for there would be none.

The state's power to abolish at any time the probate courts or their administrators connot be doubted. And if the state chose to do so even *after* an administrator had entered into bankruptcy (even by prior authority of the probate court), could anyone doubt its power in that behalf? Thus the requisite of state consent regarding its instrumentalities of government is clear. A corporation is a creature of the state and may go into bankruptcy. ***But it is not an arm or instrumentality of State Government.*** A probate court is an instrumentality of State Government. And an administrator is simply an arm of that state instrument.

Consent by the state through its probate court is thus both *requisite* and *implicit* in the Bankruptcy Act wherein the administrator is declared to be a farmer for its purposes. This Honorable Court's General Order 50(9) to that effect (requiring probate court consent for an administrator to enter bankruptcy) has indicated that construction.

III.

A representative of a deceased farmer is defined as a farmer by the Bankruptcy Act §75 in question (subsection-r) (infra 13).

But this Court's General Order in Bankruptcy 50(9) requires an administrator who under the Act seeks relief in a bankruptcy court to first obtain authority of the probate court (infra 13). General Orders have the force

and effect of law. Even of specific statutes. (Infra 13). And they are the Supreme Court's indication of its construction of the Bankruptcy Act (infra 27, 36, 44).

Thus by the General Order noted, this Honorable Court has indicated that the Act permits administrators to avail themselves of its benefits *only when their supervisory probate courts have authorized them to.* This administrator was denied authority in this case. He has no authorizing probate order. (Infra 13).

This defeats him as the courts below decided. The Act must be construed according to the General Order of this Honorable Court, *viz.*: That as to administrators it is *impliedly* conditioned upon state court consent. Otherwise it violates the 10th Amendment as a trespass upon the reserved powers of the sovereign State of Utah to establish state courts of justice and to regulate the judges and officers thereof—exclusively a state function. (Infra 24).

The concept of state consent to a Federal Act calculated to impinge upon its sovereignty is now no longer new. Such consent has been acknowledged by this court as requisite regarding the Municipal Bankruptcy Act. U. S. vs. Bekins, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137. And regarding tax matters. Steward Machine Co. vs. Davis, 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293.

Even since the Bekins case this Honorable Court again has said that the Municipal Bankruptcy Act was sustained because,—

> "The statute was 'carefully drawn so as not to impinge on the sovereignty of the State'."

And that under that Act:

> "'The State retains control of its fiscal affairs. The bankruptcy power is exercised . . . only in a case where the action of the taxing agency in carrying out a plan of composition approved by the bankruptcy court is authorized by state law'." Faitoute Iron & Steel Co. vs. City of Asbury Park, 62 S. Ct. 1129, 1133.

The lower federal courts had held—even *before* this Court's General Order so providing—that this Farmer-Debtor Act insofar as it assumes to authorize administrators to partake of its relief was subject to the implied condition of state court consent (infra 35).

And the condition of state consent to an instrumentality of state government (municipality) availing itself of federal bankruptcy was authoritatively put at rest by this court in the Bekins case and later reaffirmed in the Faitoute case supra.

The demand of General Order 50(9) requiring state court consent before an administrator may seek the Act's relief is precisely in accord with the *rationale* of those decisions by this court. The courts below ruled accordingly. They held compliance with the General Order mandatory. Their judgments accord with the principle of state consent vouchsafed by those decisions of this court.

IV.

With these preliminary observations respondent for its brief here now adopts its brief below where it was appellee in the Circuit Court of Appeals. Full statement and argument of the case is made therein. It is bound hereto and follows.

The judgments of the Circuit Court of Appeals and District Court below must be affirmed.

Respectfully,

HADLOND P. THOMAS,
Counsel for Respondent,
Salt Lake City, Utah.

DANIEL H. THOMAS and
THOMAS & THOMAS
Of Counsel.
December 3, 1942.

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United States Circuit Court of Appeals

TENTH CIRCUIT

No. 2461

STERLING P. HARRIS, as Administrator of the Estate of Anna L. Harris, deceased, *Appellant*,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY, *Appellee.*

In the Matter of Anna L. Harris, Debtor, Since Deceased. Appeal From The District Court Of The United States For The District Of Utah.

BRIEF OF APPELLEE

I.

APPELLEE'S STATEMENT OF THE CASE.

Appellant's statement is substantially correct although not complete.

This case has been before many courts, the lowest and the highest in the land. Its history and chronology may thus be difficult to grasp. Therefore, we pause at the outset to fully state that history as it has unfolded in those various courts.

It commenced in the federal bankruptcy court of Utah. It then shifted to the state district (probate) court of Salt Lake County. From there it journeyed by appeal to the Utah Supreme Court. The United States Supreme

Court granted certiorari. Upon hearing and argument the Federal Supreme Court dismissed the certiorari leaving the matter as decided by the State Supreme Court. The case then moved back to the federal bankruptcy court (whose judgment is here for review). It shifted finally to the state probate court once more where it ended.

A complete understanding demands a separate knowledge of the proceedings before each court. They will now be reviewed.

A.

FIRST IN THE BANKRUPTCY COURT.

December 18, 1937 (R. 14) or at least December 20, 1937 (R. 3,—the date is not important) Anna L Harris, appellant's intestate, filed in the federal bankruptcy court of Utah her petition for relief as a farmer-debtor under Section 75 of the Bankruptcy Act, 11 U. S. C. A. §203. This case originated with that event.

Thus (except for making an offer of composition and extension February 10, 1938,—R. 3—at which point nothing further occurred) the activities of Anna L. Harris ended and the case rested.

November 23, 1938 the proceedings had been pending just short of a year and Anna L. Harris died (R. 6-14) January 16, 1939, the bankruptcy court observing Mrs. Harris' death made an order whereby the bankruptcy proceedings were abated (R. 3-14) and the case shifted to the state probate court.

No appeal from that order of abatement was taken. It was never reversed or modified and it still stands.

B.

NEXT IN THE STATE PROBATE COURT.

March 30, 1939 (2½ months after the federal court abated the debtor proceedings) appellant Sterling P. Harris

was appointed administrator of Mrs. Harris' estate by the state probate court and received letters of administration at its hands (R. 6-14).

Thereafter appellee Zion's Savings Bank and Trust Company in a suit against said administrator in the same state court (district courts also sit in probate in Utah, Revised Statutes Utah 1933 §102-1-6) foreclosed its mortgage on real property of the deceased.

The foreclosure judgment was July 17, 1939. August 15, 1939 the bank purchased at foreclosure sale and received the sheriff's certificate of sale.

In Utah foreclosure sales are subject to redemption within 6 months (R. 15).

No redemption was made and so appellant later received a sheriff's deed (R. 15).

February 13, 1940 (just 2 days before the period of redemption expired) the administrator upon petition obtained an order of the probate court (as he conceived he must and as administrators are first required to do by General Order 50(9)—11 U. S. C. A. §53-100, 1941 pocket part, p. 44) authorizing him as the personal representative of said deceased to apply to the federal bankruptcy court for an order to *revive* the debtor proceedings which that court had abated January 16, 1939 after Mrs. Harris' death (R. 5, 15).

The probate court's order, however, also provided for appeal therefrom by the bank to the State Supreme Court and for a stay of said order meanwhile on appeal by supersedeas to be given by the bank (R. 5, 15).

Immediately upon entry of the order on that day (February 13, 1940) the bank appealed, gave the supersedeas, and thereby at once stayed the order as therein provided according to state law (R. 15). The case thus shifted to the Utah Supreme Court.

Utterly disregarding the stay ordered on the appeal, however, the administrator later the same day petitioned the bankruptcy court (by petition already prepared and dated February 9, 1940) to revive the debtor proceedings.

His petition stated he had become equipped with the required order of the probate court and attached a copy (R: 4, 5, 15). It did not state, however, that the order had been stayed on appeal. The bank, however, brought this fact to the attention of the federal court by its answer later filed pending the probate appeal (R. 7).

C.

IN THE UTAH SUPREME COURT ON APPEAL FROM THE STATE PROBATE COURT.

September 13, 1940. On the bank's appeal of the probate court order (authorizing the administrator to proceed to revive the bankruptcy proceedings) the order was reversed by the State Supreme Court in a unanimous decision, because in Utah (1) probate is purely statutory, (2) the probate court and administrator derive their powers exclusively from the statute and have only the powers so conferred, (3) those statutes do not expressly or by implication authorize an administrator to enter into bankruptcy nor may a probate court direct him to do so, and (4) moreover, by the Utah law of descent which attaches immediately on death, all property real and personal vests in the heirs and its devolution is not suspended or changed by any prior intervention of bankruptcy jurisdiction. R. S. U. 1933, §101-4-2, Zion's Savings Bank vs. Harris, 99 Utah 464, 105 P. (2d) 461.

Thus the purported authorizing order of the probate court (which had been stayed and utterly deprived of force pending the appeal) required by General Order 50(9),

sought by the administrator and therefore conceded by him to be requisite to his effort in the bankruptcy court, was swept away and denied him leaving him utterly bereft of even its dubious effect.

D.

IN THE UNITED STATES SUPREME COURT ON FURTHER APPEAL FROM THE STATE PROBATE COURT.

By the State Supreme Court's reversal the administrator was left without the authority of the probate court required by General Order 50(9) to pursue the proceedings in the bankruptcy court.

And so adopting the view that the probate court had no power to deny him, he sought and was granted certiorari in the United States Supreme Court to review the reversal by the State Supreme Court. Harris vs. Zion's Savings Bank, 312 U. S. 670, 61 S. Ct. 611.

The case was heard and argued before the United States Supreme Court. April 14, 1941 that court per curiam dismissed the certiorari thus sustaining the State Supreme Court's reversal upon the grounds that,—

> "The Supreme Court of Utah has held that under the Probate Code of the State the Probate Court had no power to make the order. The decision thus rests upon an adequate non-federal ground."

and remarking that the federal question,—

> "Whether in such circumstances a District Court of the United States sitting in bankruptcy could entertain a petition of the personal representative of the deceased farmer under Section 75 of the Bankruptcy Act, was not necessarily involved."

And so from the United States Supreme Court the case was remanded to the State Supreme and probate courts where the latter, August 25, 1941, annulled the order pursuant to that reversal. (R. 15)

And then the case shifted back to the federal bankruptcy court where it had started.

E.

BACK IN THE BANKRUPTCY COURT AGAIN.

By the State Supreme Court's reversal and his unhappy appeal to the United States Supreme Court the administrator was denied by the probate court, his creator, and still stands without that which the General Order has lawfully ordained as indispensable and prerequisite to any effort by him before a bankruptcy court, and which he was bound to exhibit there at the outset as part of any application and without which no administrator may enter,—

> "An order of the probate court authorizing him to file the petition." General Order 50(9).

But at this point he changed his view and took the position that no authority by his creator, the probate court, was necessary despite the specific command of the General Order to the contrary, and set about, notwithstanding, to proceed in bankruptcy where his intestate had left off.

Meanwhile, remember, he had already petitioned the bankruptcy court for a revivor on the strength of the probate court's ill-fated order which had already been stayed. He had done this in violation of the stay already effected the same day by the bank's appeal and supersedeas (R. 4).

Also, meanwhile (2 days later, February 15, 1940, the day of expiration of the redemption period in the bank's foreclosure) he had persuaded the bankruptcy court to order the bankruptcy proceedings to be "*continued*" by him as administrator. This also he had done in the face of the bank's appeal and stay already effected (R. 7).

And March 14, 1940 to apprise the bankruptcy court, the bank had answered the administrator's revivor peti-

tioner there; had suggested the probate appeal and stay which had already been effected; the consequent invalidity of the administrator's unauthorized efforts and the invalidity of the bankruptcy court's purported order of "*continuation*" of the proceedings based upon that invalid effort. Here the matter rested thus pending the probate appeal (R. 8).

September 18, 1940 (5 days after the state court's reversal of the probate order) the administrator "deposited" with the clerk in bankruptcy an *amended* petition under subsection (s) of the Act.

That same day, however, the bankruptcy court in view of the State Supreme Court's decision 5 days earlier, refused to accept the amended petition and ordered it not filed. It also ordered the administrator to show cause why his revivor petition should not be dismissed (R. 10).

Meanwhile, the probate order journeyed from the State Supreme Court to the United States Supreme Court; the certiorari was dismissed, and the probate court set the order aside in pursuance of the reversal August 25, 1941. (R. 15).

August 29, 1941 the bank again attacked the revivor petition and also the amended petition "*deposited*" under subsection (s) by motion (amended motion) in the bankruptcy court. The attack was by motion to strike both petitions for want of authority by the probate court required by General Order 50(9). The motion and supporting affidavit recited the history of the case (R. 11).

September 30, 1941 the cause was heard by Judge Johnson in federal court. He made findings (R. 15), conclusions, (R. 15) and a final order (R. 17).
The findings are a recital of the case history.
The order following the conclusions of law:

(A) Annulled and vacated the previous order "*continuing*" the bankruptcy by the administrator.

(B) Dismissed the administrator's revivor petition.

(C) Rejected and finally again ordered that the administrator's amended petition under subsection (s) not be filed.

(D) Denied the bank's motion to strike the petitions and dismiss.

Thus ended the case in the bankruptcy court. From that order the administrator appeals.

But he did not appeal at once. Still struggling with the command of General Order 50(9) he turned again to his creator, the probate court, for some color of authority to sustain him in taking this appeal. This time he petitioned that court for authority to appeal the final order of the federal court. He was refused as will presently appear.

F.

AGAIN IN THE PROBATE COURT.

October 10, 1941 (after the bankruptcy court had dismissed and rejected his petitions and annulled the order of revivor) the administrator petitioned his creator, the probate court, for leave to take this appeal. The bank protested (R. 18).

October 17, 1941 the probate court denied and dismissed his petition and ordered:

(a) That he not be authorized to appeal.

(b) That the prior reversal by the State Supreme Court of his purported authorization to revive the bankruptcy was res judicata of the matter. (Stipulation R. 18, 19)

This last order of the probate court was not appealed and stands. Appeal time expired January 17, 1942 (90 days) by Utah law. Session Laws Utah 1939, p. 158, §104-41-2. Here ends the history of this case.

II.

WHAT IS BEFORE THIS COURT ON THIS APPEAL.

With the history of this case in mind let us consider what is before this court on this appeal. What are we trying?

A.

What We Are Not Trying.

We are not trying the order which abated the bankruptcy. That order was made January 16, 1939. No appeal was taken and it became final more than 3 years ago (R. 3).

We are not trying the ill-fated probate order (stayed on its appeal) which purported to authorize appellant to seek a revivor in bankruptcy and which was reversed and annulled by the State Supreme Court. Even the United States Supreme Court acknowledged itself powerless to do that (R. 15).

We are not trying the foreclosure proceedings in the state court which resulted in judgment for the bank July 17, 1939 (R. 15). They have never been questioned or attacked in any court.

We are not trying the federal bankruptcy court for having wrongfully dismissed the bankruptcy proceedings. The bank's motion to dismiss was *denied* (R. 17-18). Appellant has mistakenly assigned error upon an *alleged dismissal.* (His Brief 4).

We are not trying the power of the federal court as to what that court might have done upon its own initiative.

We are not trying any of the foregoing.

B.

What We Are Trying.

Only the matters set forth in the notice of appeal are being tried (R. 19). That notice reveals the answer to what

is before this court. This appeal is from Judge Johnson's final order of September 30, 1941 (R. 17-18); nothing else.

Only the following 3 matters contained in the order are being tried:

We are trying (1) that part of the order which vacated and annulled the earlier order of revivor made February 15, 1940 on the administrator's petition presented to the bankruptcy court 2 days before when the ill-fated probate order of authority was given, and which was later reversed (R. 17).

We are trying (2) that part of the order which dismissed the administrator's petition to revive after the federal bankruptcy court learned of the state court reversal of the probate order of authority previously purported to have been granted the administrator (R. 17).

We are trying (3) that part of the order which ordered for the second time that the administrator's amended petition under subsection (s) not be filed (R. 10, 18).

We are trying only the 3 foregoing matters contained in the order appealed from. Nothing more.

III.

THE ORDER OF ABATEMENT WAS CONCLUSIVE.

Appellant argues that the death of Mrs. Harris in bankruptcy did not work an abatement of the proceedings. He cites §8 of the Bankruptcy Act which says death does not abate. 11 U. S. C. A. §26.

By that section the debtor's death *itself* did not accomplish that result. *But Judge Johnson's order of January 16, 1939 did.* His order said:

> "It is hereby ordered, adjudged and decreed that this cause do now abate." (R. 4)

Now the Act does not say that the court may not abate. It simply says that death alone does not. But for argument, if it were an interdiction against a court's abatement, still the court had jurisdiction and its order was only error at most, not void, and could be attacked only on appeal and not collaterally.

The rule applies in bankruptcy as in other proceedings. Union Joint Stock Land Bank of Detroit vs. Byerly, 310 U. S. 1, 60 S. Ct. 773. And an order by a bankruptcy court permitting a creditor to foreclose against a debtor already in court under §75, even if erroneous, becomes conclusive in the absence of timely appeal. Bernards vs. Johnson, 62 S. Ct. 30.

And this court itself says that a bankruptcy order authorizing issuance of a sheriff's deed after a debtor is sheltered within §75, though erroneous, is not void. And it may not even be challenged collaterally later on an appeal from another order in the same proceedings. Buttars vs. Utah Mortgage Loan Corporation (10 Cir.) 116 F. (2d) 622. Certiorari denied, 313 U. S. 572, 61 S. Ct. 958.

So the order of abatement was conclusive.

And appellant so regarded it for (1) he petitioned the *probate* court for authority to *revive* and (2) he next stated in his petition to the *bankruptcy* court that,—

> "by reason of the death of said debtor the said proceedings was abated"

and prayed,—

> "for an order of this (bankruptcy) court *reviving* and reinstating said proceedings under the terms of §75 of the said Bankruptcy Act." (R. 4).

But appellant does not ask to have that order vacated. It occurred January 16, 1939. The only order he appeals is the final order of September 30, 1941 (1) vacating the revivor, (2) dismissing his earlier petition to revive and (3) rejecting his amended petition under subsection (s) which he "deposited" with the clerk.

IV.

SINCE APPELLANT HAS NO AUTHORITY FROM THE PROBATE COURT, HIS CREATOR, THE BANKRUPTCY COURT PROPERLY REFUSED TO RECEIVE HIM.

The administrator relies here, as he has done in all courts where this case has visited, wholly upon that part of the Bankruptcy Act §75 (r) which includes a deceased farmer's administrator within the definition of a farmer,—

> "For the purposes of this section . . . and Section 202, the term 'farmer'. . . includes the personal representative of a deceased farmer." 11 U. S. C. A. §203 (r).

But he refuses to accept the accompanying burden of General Order 50(9) promulgated by the United States Supreme Court January 16, 1939 (the very day the bankruptcy court abated the proceedings) which was designed by the Court respecting the Act. It provides:

> **General Order 50(9).**
>
> "The personal representative of a deceased farmer who desires in his representative capacity to effect, under section 75, a composition or extension of the debts of the estate, shall attach to his petition, in lieu of schedules, the following papers, certified as correct by the court which appointed him (hereinafter referred to as the probate court): (a) a copy of the order of his appointment, (b) a copy of an order of the probate court authorizing him to file the petition," . . . etc. General Order 50(9). 11 U. S. C. A. (§§53-100), 1941 Pocket Part, p. 50.

General Orders have the force and effect of law. Leonard vs. Bennett (9 Cir.) 116 F. (2d) 128. Sabin vs. Blake McFall Company (9 Cir.) 223 F. 501. In re Gerber (9 Cir.) 186 F. 693. Even of a specific statute. Sherman and Son vs. Corin (1 Cir.) 73 F. (2d) 468.

By that General Order requiring administrators to first gain authority from their creators, the probate courts,

the United States Supreme Court recognized the paramount power of such courts over their creatures, administrators and executors. It thereby conceded them as incompetent in bankruptcy without such authority and rightly so, for they are only the creatures of the courts which create them, and no more, being officers of those courts and wholly subservient to their control and to the limitations of the applicable state statutes.

Moreover, that view was fully recognized by positive statute elsewhere in the Bankruptcy Act where former §74, (11 U. S. C. A. §202 now amended and incorporated in Chapters 10-14, 11 U. S. C. A. §§501-1103 see table of Bankruptcy Act sections, 11 U. S. C. A. §201 to end, p. ix) included the personal representative of a deceased but expressly required that he first "obtain the consent and authority of the court which has assumed jurisdiction of said estate."

Now the denial of the probate court's consent was not the product of simple refusal by that court to yield its consent to the administrator, although that alone by General Order 50(9) would have been sufficient. It was upon more solid ground as the state court's opinion reveals. It was altogether upon the firm ground that state statutes comprising the Utah Probate Code as construed by the high state court, the final arbiter in such cases, do not permit administrators to shake off the jurisdiction of their creators, the probate court, and stray afield beyond its domain, neither do they allow that court to permit them to do so; and also upon the ground that the administrator had no title to the property, it having devolved *instanter* upon the heirs. The highest state court having reached that result regarding a matter of state law, its decision is conclusive. Since neither administrator nor probate court were endowed by the Utah Probate Code of the power sought, the state court's decision upon that point is conclusive.

The Utah Supreme Court said:

> "The question here is not whether the Frazier-Lemke Act permits the administrator of a deceased farmer to file a petition for debtor's relief under

the moratorium provisions of the act, *but whether the Probate Court has the authority to authorize an administrator to file such a petition in the United States District Court.*" (Italics added). In re Harris' Estate, 105 P. (2d) 461.

Then recounting the necessity of state court consent as required by General Order 50(9) the State Supreme Court approached the problem of the administrator's authority and powers by investigating their source, finding it to be exclusively in the Probate Code:

> "The source of the administrator's power and that of the probate court must be found in the Probate Code. Nowhere in the Probate Code is there any power expressed authorizing an administrator to resort to the Frazier-Lemke Act or permitting the probate court to authorize him to do so. Federal courts have no jurisdiction in probate matters in respect to the administration of the estates of deceased persons. 2 Hughes Federal Practice, Jurisdiction and Procedure, Sec. 985."

Continuing, the court remarks:

> " 'Proceedings for the administration of estates of decedents are purely statutory.' 1 Bancroft's Probate Practice, p. 76, Sec. 37."

And:

> "Jurisdiction of the Probate Courts to administer upon the estate of decedents is primary and *exclusive*. 1 Bancroft's Probate Practice, p. 62, Sec. 33." (Italics added).

Then of the origin and extent of the state probate court's powers, it is said:

> " 'The court, sitting in probate, derives its power from the statutes and has *only* such powers as are granted by statute or reasonably implied or reasonably necessary and proper to effectuate the powers which are given.'" In re Cloward's Estate, 95 Utah 453, 82 P. (2d) 336, 339, 119 A. L. R. 123.

"The problem presents the anomaly, if allowed, of a probate court *divesting* itself of the management of the estate and permitting its appointee who represents the interests of the heirs, if there are any heirs of the deceased, to be subjected to the jurisdiction of another tribunal." (Italics added).

Then of the administrator's status and limited right to the property the court adds:

"The administrator is neither a debtor nor a bankrupt, and has only the control of the property for the purpose of pursuing the statutory *probate* proceedings in order that the heirs may receive what there is remaining after the expenses of administration have been paid and the claims of creditors have been satisfied." In re Harris Estate, 105 P. (2d) 461, 462.

And upon other considerations the Utah Supreme Court likewise concluded that the administrator and probate court are powerless under the state code. It referred to Section 101-4-2 Revised Statutes of Utah 1933, which deals with descents of property of intestates and is as follows:

"The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purpose of administration." Revised Statutes of Utah 1933, §101-4-2.

This statute, the court holds, casts the property of an intestate upon his heirs and hence the administrator has no title to take into the bankruptcy court even could he be given leave to go.

And in its view the Utah court was well supported. In re Buxton (D. C. Ill.) 14 F. Supp. 616. That case was decided before the General Order. But the supreme authority of probate courts over their creatures was at once recognized and the fact that in Illinois title to real property descends at once to the heirs, as all property both real and personal does in Utah, leaving the administrator without

title, impelled that court to conclude the administrator could not enter into bankruptcy.

And within this circuit an Oklahoma federal court opinion was also found to support the Utah decision. In re Reynolds, 21 F. Supp. 369. The facts were strikingly similar to our own and the Utah Supreme Court decided its rule was sound.

There 3 months (here 11) after filing, the debtor died and the proceedings were dismissed.

One month later (here 2) the administrator was appointed.

Eleven months thereafter (same here) administrator petitioned the federal court to revive.

He was met with a motion to dismiss on the grounds title vested by Oklahoma law *instanter* in the heirs; not in the administrator. The applicable Oklahoma law (O. S. 1931 §1615, 84 Okl. St. Ann. §212) is identical with Utah's Revised Statutes 1933 §101-4-2, supra 16, and vests the property real and personal of intestates in the heirs; not in an administrator.

Judge Vaught there ruled the administrator could not enter his federal court because he had not received the prior consent and authority of his creator, the Oklahoma county court. Judge Vaught declared:

> "The question of whether or not an administrator can maintain an action in bankruptcy under section 75 of the Bankruptcy Act has not been passed upon by the higher courts, but in an opinion involving the same substantial provisions of the statutes of Illinois as are contained in the Oklahoma Statutes, with reference to the powers of executors and administrators, the District Court for the Eastern District of Illinois, in the case of In re Buxton's Estate, 14 F. Supp. 616, has held (quoting from the sixth syllabus): 'Deceased farmer's administrator, appointed under Illinois law, could not be adjudicated a bankrupt under statute, notwithstanding statute includes personal representative of deceased

> farmer within designation of "farmer," in view of limited authority of administrator over decedent's real estate under Illinois law and his consequent inability to subject decedent's real estate to provisions of statute (Bankr. Act §75(r, s), as amended, 11 U. S. C. A. §203(r, s).'" In re Reynolds, 21 F. Supp. 369, 371.

And, unable to conceive of a different result under the circumstances, he concluded:

> "The Illinois statute is so similar to the Oklahoma statute that the court cannot conceive of a different conclusion under the circumstances of this case, than that reached by Judge Wham in the Illinois case. It is the judgment of the court that the administrator cannot maintain this action." In re. Reynolds, supra.

It is worthy of note that both Judge Vaught's decision and that of the Illinois federal court were rendered before the General Order. Though those federal judges and the judges of the United States Supreme Court were widely separated by geography, their decisions and the General Order manifest the unity of legal concept resulting in their minds on contemplating the Act's inclusion of an administrator, merely an arm of the probate court, within its definition of a farmer. Could a mere instrumentality through which a state probate court moves repudiate its master's authority?

Could that which a probate court might appoint or refuse to appoint or remove at will, or which it might chastise for wholly insignificant delicts refuse to do its command?

Could the mere instrument harken to the strain poured out by the definitive subsection (r) and be wooed from its master in whom resides the absolute power to destroy its very existence at will,—even for so little as having stopped to listen to that strain?

Could a mere nonentity, devoid of existence apart from its creator, become the master of that court, detach itself, make off with assets of the heirs, deposit them in bank-

ruptcy and dare the master to reclaim them under pain of contempt against a new tribunal—one bereft of probate powers—adopted by the outlaw?

And once safely harbored within the adopted court, what would become of the powers of the actual parent to chasten or even end the existence of the wayfarer?

Could the latter call upon the adopted court to enjoin the will of the parent apart from whom he has no possible existence?

Could the mere instrumentality by these cumulative efforts equip himself with strength to overpower the true proprietor?

What manner of Frankenstein, then, had a probate court created to destroy itself?

These perturbing queries seem to have occurred at once to the legal minds of the Illinois and Oklahoma federal judges and those of the United States Supreme Court upon contemplating subsection (r). They assuredly actuated the decisions of those federal judges. They likewise moved the Supreme Court judges to adopt the General Order.

The provisions of General Order 50(9) are mandatory. Lemm vs. Northern California National Bank, 93 F. (2d) 709. That case came after the General Order. There a California federal court dismissed because the administrator was without an order of the probate court. The Circuit Court of Appeals affirmed saying:

> "An administrator is in a real sense an officer of the state court and is subject to its direction and control. 11 A. Cal. Jur. 77-79. A proper respect for the jurisdiction of the state court demands a strict adherence to the provisions of the General Order. The bankruptcy court has no authority to entertain the petition of a personal representative of a deceased farmer *unless authorization has been obtained by him from his supervisory court.* No authority of this sort was presented by the petitioner and the rules mentioned were in no manner complied with. Since the motion of the appellee creditors to

dismiss the petition was based in part on the petitioner's disregard of the jurisdiction and authority of the probate court, dismissal was proper." (Italics added) Lemm vs. Northern California Nat. Bank, 93 F. (2d) 709, 711.

Here appellant unsuccessfully sought consent of the probate court. It was refused him. The General Order commands that he shall first obtain it. Its requirements are mandatory. The court properly dismissed his unauthorized petitions.

V.

STATE LAWS OF DESCENT ARE NOT SUSPENDED BY BANKRUPTCY PROCEEDINGS OR THE JURISDICTION OF THE BANKRUPTCY COURT.

Appellant makes much of the fact that his intestate died while the bankruptcy proceedings were pending in federal court and after that court's jurisdiction had attached. The implication of this argument, carried to conclusion, is that the proceedings in the bankruptcy court pending at death actually suspended the state laws of descent and distribution. For if regardless of state statutes of descent, an administrator may seize upon the property of the heirs to whom it otherwise descends by state law and by his own whim substitute the administration of a federal court, admittedly without probate powers, for that of a probate court, and withhold it from the heirs three years under the Frazier-Lemke moratorium, then statutes of descent are certainly suspended. None of the heirs, not one of them, may want the bankruptcy proceedings instituted, or if already instituted, maintained over the property. They may all prefer the probate court, upon whom the state law enjoins that duty, to administer and distribute it. Bankruptcy, as it is to most people, may be distasteful to them. They may desire and have ample means themselves to discharge the debt upon the property and receive it at once at the hands of the probate court,—not three years hence. Yet these heirs, the owners in law and to whom the property has descended by state law, cannot prevent a selfish administrator from resorting to bankruptcy and withholding the property—*their own property*—from them if he will. This is exactly where appellant's argument leads.

Moreover, Section 75 is a Bankruptcy Act for *relief* of debtors. When this debtor died the necessity for her relief was ended. As the Supreme Court observed in Local Loan Company vs. Hunt, 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A. L. R. 195, the purpose of the Bankruptcy Act has been "again and again emphasized" as being to give the honest debtor:

> "A new opportunity *in life* and a clear field for *future effort*." (Italics added).

This purpose is now lately reaffirmed in respect to Section 75 itself. In the recent case Wright vs. Union Central Life Insurance Company the court again said:

> "The development of bankruptcy legislation has been towards relieving the honest debtor from oppressive indebtedness *and permitting him to start afresh.*" (Italics added). Wright vs. Union Central Life Insurance Company, 304 U. S. 502, 514, 58 S. Ct. 1025, 1032.

To the same effect see Williams vs. U. S. Fidelity & G. Co., 236 U. S. 549, 554, 555, 35 S. Ct. 289, 59 L. Ed. 713; Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 582, 55 S. Ct. 854, 859, 79 L. Ed. 1593, 97 A. L. R. 1106.

When this debtor died the purpose of the Bankruptcy Act, relief of a debtor, was at once fulfilled. *Death* afforded that relief to her. In the midst of her endeavors in bankruptcy death had brought to a close that "opportunity in *life . . . for future effort*" which she had hoped the bankruptcy would afford by its "*permitting her to start afresh.*" Thenceforward the property and debts were the concern of those upon whom the property devolved by operation of state law. She no longer required relief as a debtor.

The death of the debtor amidst the debtor proceedings did not stay the state laws of descent but her property was cast accordingly upon her heirs.

VI.

THE STATE COURT'S DECISION IS CONCLUSIVE UPON THE POWERS OF THE PROBATE COURT AND ITS INSTRUMENTALITY, THE ADMINISTRATOR.

Of course, the decision of the Utah Supreme Court is conclusive upon the powers of the state probate court. Since the overruling of Swift vs. Tyson, 16 Pet. 1, 10 L. Ed. 865 state law, both written and unwritten, is determined conclusively by state courts and binds the federal courts everywhere. Erie Railroad Company vs. Tomkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

A decision even of an intermediate appellate state court in the absence of a higher court decision is binding as to state law in the federal courts. Fidelity Union Trust Company vs. Field, 61 S. Ct. 176. West vs. American Tel. and Tel. Company, 61 S. Ct. 179. Six Companies vs. Joint Highway District No. 13, 61 S. Ct. 186, Stoner vs. New York Life Insurance Company, 61 S. Ct. 336. Russell vs. Todd, 309 U. S. 280, 60 S. Ct. 527.

In fact where between judgment and appeal in federal court the highest state court reverses itself changing the state law as it stood upon the federal trial and judgment, the federal appellate courts must abide the change and reverse the judgment notwithstanding it conformed to state law when it was rendered. Vandenbark vs. Owens-Illinois Glass Company, 311 U. S. 538, 61 S. Ct. 347.

The rule applies in bankruptcy courts. They, too, are bound by state court decisions upon state law. Therefore, where questions of property law have not been decided by state courts the federal bankruptcy court must remit the parties to a state court action to assure rights in local property not being determined contrary to state law by the accident of federal jurisdiction. Thompson vs. Magnolia Petroleum Company, 309 U. S. 478, 60 S. Ct. 628.

The rule is indubitable. When the Supreme Court of Utah determined that its state law did not empower a probate court to give consent to an administrator, that proposition was authoritatively concluded forever. It binds this and all other courts within the federal system, including

even the Honorable United States Supreme Court. That court so acknowledged on dismissing the certiorari, Harris vs. Zion's Savings Bank and Trust Company, 313 U. S. 541, 61 S. Ct. 840, 85 L. Ed. 1509. A Utah probate court may not empower its administrator to proceed in bankruptcy.

Certainly then its administrator cannot rise above its master and proprietor, apart from whom it never can exist, and claim to be equipped with powers the state has never granted either. His powers derive exclusively by state law. They are bestowed entirely within and by a state court. He is the bare instrument of that court; no more.

The probate judge himself is similarly that court's instrument. He is a state officer of a state court with powers in behalf of and delimited expressly by the state. The "establishing of (state) courts of justice, the appointment of judges" and their regulation is the "exclusive and peculiar province" of each state. Calder vs. Bull, 14 L. Ed. 648.

The regulation of its courts' jurisdiction is wholly a matter for a state. Rejsenhoff vs. Colonial Nav. Co., 35 F. Supp. 577.

As interpreted by its highest court, the Utah laws do not admit of a probate court's consent to an administrator's attempt in bankruptcy. The court itself cannot consent. Neither can the probate judge, for he, too, is but an instrument of that court. A judge could not turn the estate over to a bankruptcy court. The Utah law forbids. Nor could he as judge in behalf of an estate being administered in his court file a petition in bankruptcy and transfer that administration to a federal court,—which has no probate powers. Suppose the Act said a probate judge could take the estate into bankruptcy. The spectacle of a judge himself assuming to file a bankruptcy petition for one of his estates is in law ridiculous to contemplate. He could not. He cannot even consent. And an administrator is an instrument of even lesser power.

The probate court itself is bereft of power to consent. The instrumentality of that court cannot be less bereft.

Both exist by grace of state law only and only within the ambit of state law. That ambit does not encompass the power claimed. Zion's Savings Bank and Trust Company vs. Harris, 99 Utah 464, 105 P. (2d) 461. Probate court and administrator both are therefore unendowed of power to resort to bankruptcy.

VII.

THIS COURT WILL NOT ANNUL GENERAL ORDER 50(9).

Appellant contends he has the right to proceed in bankruptcy by virtue of subsection (r), 11 U. S. C. A. §203 (r) which says he is a farmer.

He holds that right is absolute.

He refuses to be bound by General Order 50(9). Though he first confessed its effect in making application to his probate court and also petitioned the bankruptcy court under the ill-fated probate consent which transpired to be void, upon discovery of that circumstance he became convinced his efforts had been unnecessary. The General Order in his view is not to be observed; the court below should have ignored it, and should have admitted him regardless.

This position can only mean, though appellant will not in terms assert, that the General Order is a nullity and void and that this court should disregard it and avoid its effect.

But circuit judges will not assume to declare a General Order void. That prerogative must be reserved for the Supreme Court who prescribed it. In re Bronx Ice Cream Company (2 Cir.) 66 F. (2d) 620. In re Jaffee (D. C. Mass.) 272 F. 899.

The Circuit Court of Appeals said in the Bronx Ice Cream case:

> "Appellants also take the broad ground that we should hold invalid the last clause of General Order 39 which Local Rule 22 was drawn to carry into effect. On the merits we see no basis for such a decision, but in any event *only the Supreme Court* which, acting pursuant to §30 of the Bankruptcy Act, 11 U. S. C. A. §53, prescribed the General Order should declare it unlawful. We certainly cannot with propriety hold General Orders promulgated by the Supreme Court unlawful. For the foregoing reasons General Order 39 and Local Rule 22 are held valid."

General Order 50(9) is an indication by the Supreme Court of its construction of subsection (r). Such orders and forms in bankruptcy have been referred to by that court as indicating its construction. Zavelo vs. Reeves, 227 U. S. 625, 33 S. Ct. 365, 57 L. Ed. 676.

VIII.

CONCERNING ADMINISTRATORS, THE VALIDITY OF SUBSECTION (r) DEPENDS ON ITS CONSTRUCTION AS PRESCRIBED BY GENERAL ORDER 50(9).

Succession to property is exclusively at the will of and subject to the sovereign power of the several states. 16 Am. Jur., Descent and Distribution, §12.

The states have sole power over the devolution of property by descent. 11 Am. Jur., Conflict of Laws, §48.

Manifestly, therefore, the federal courts have no probate jurisdiction:

> "A proceedings for the probate of a will is not a sujt of a civil nature at law or in equity within the jurisdiction vested by the Judiciary Acts upon the federal courts, and they have no jurisdiction over such proceedings and of distribution of estates because (1) *the subject is statutory*, and (2) they are in the nature of proceedings in rem, and proceedings in rem are not a part of general equity jurisdiction of any court.
>
> "The federal courts cannot distribute generally because the state courts must first establish the succession. *In truth they have no probate powers or authority.*" (Italics added.) 2 Hughes Federal Practice 216, 217.

Since the property devolves entirely by grace of state law, and since state probate courts have exclusive jurisdiction, it is important to explore the situation where, as here, a debtor dies during her sojourn in bankruptcy *under* §75.

Now in general bankruptcy a debtor's property vests *instanter* in the trustee. 11 U. S. C. A. §110. It thus *passes* from the debtor. Consequently the debtor's death in *general* bankruptcy does *not* affect the title to the property. It remains in the trustee where it vested. That is why §8 provides that death itself shall not abate a general bankrupcy and that the proceedings shall be concluded notwithstanding (which of course includes a distribution of assets).

11 U. S. C. A. §26. **But not so by §75.** That special proceedings does not vest title in either bankruptcy trustee or court. Title never passes *from the debtor.* He retains the title in himself contemplating that he will eventually emerge rehabilitated and undeprived of it. This court just recently so stated:

> "But a proceedings under Sections (a)—(r) of 75, 11 U. S. C. A. Section 203 (a)—(r) does *not* operate to pass title from the bankrupt to the trustee or the bankruptcy court, but contemplates a status quo pending an adjustment and composition of his debts and is designed to grant a moratorium wherein the debtor will retain title and emerge from the proceedings seized with all the property subjected to the bankruptcy proceedings." Miller vs. Mangus, January 12, 1942. (10 Cir.) 125 F. (2d) 507.

Consequently, a debtor's death in the special proceedings under §75 works a different result respecting property then in general bankruptcy. Whereas in general bankruptcy the bankruptcy court through its *trustee* is seized of the property, in special bankruptcy under §75 the debtor *himself* is vested; not the bankruptcy court or its trustee. Hence, upon the debtor's death all property of which he was seized descends by operation of law—state law—and is cast according to that rule of devolution; and if he die intestate it,—

> "passes to the heirs of the intestate, subject to the control of the (probate) court" etc. Revised Statutes Utah 1933, 101-4-2.

Now laws of descent and of administration in probate are matters exclusively of state concern. They are beyond the competence of Congress and the federal courts. Neither may trespass in regard to the probate court's authority over a deceased's property.

Yet subsection (r) assumes to say that an administrator, the creature and instrument of a state probate court, may leave its master apart from whom it has no existence and take a federal court for an adopted parent. In its fullest implications this is startling. It is at once a trespass

upon the reserved and exclusive powers of the states "to establish state courts of justice and regulate their jurisdiction" heretofore observed. Supra 24. And encroachment by the Federal Government upon the reserved powers of the states contravenes the 10th Amendment which provides:

AMENDMENT X

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

But if an act may by possible construction be sustained, that construction will be indulged. There is a construction, but only one, whereby subsection (r) will survive. That construction the Supreme Court employed when in contemplating subsection (r) it enacted General Order 50(9) to prescribe that administrators must first gain consent of their state courts.

So construed, subsection (r) is unattended by a constitutional doubt. The states continue thus to establish and regulate their probate courts and jurisdiction. Their regulation and jurisdiction in such case is not lost to them or appropriated by the Congress.

The identical principle, we affirm, is already settled in the Supreme Court. Hopkins Federal Savings and Loan Association vs. Cleary, 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 209, 100 A. L. R. 1403. Congress there had enacted under the Federal Home Loan Bank Act (12 U. S. C. A. §1464) that any State building and loan association, a member of the Federal Home Loan Bank (like banks are members of the federal reserve system) might convert itself into a Federal association upon a vote of the stock. It thus would shake off its state proprietor and adopt a federal foster parent.

A Wisconsin association voted to make the change; received a federal charter, and threatened to use it.

Wisconsin, by its bank commission, obtained a state court injunction against the renegade association to hold it to its state charter. The State Supreme Court affirmed.

Wisconsin's position was that (1) the Act was subject to the implied condition of state consent; (2) otherwise, it was void by the 10th Amendment for unconstitutionally trespassing upon state powers.

The Wisconsin Supreme Court adopted the first position to avoid the embarrassing question of constitutional law and held the condition of state court consent was implicit in the Act.

On appeal the United States Supreme Court was more forthright. It found no condition of state consent within the Act and held it void for encroaching on the reserved powers of Wisconsin in violation of the 10th Amendment. It said:

> "Congress did not mean that the conversion from state associations into federal ones should be conditioned upon the consent of the state or compliance with its laws."

And of this effect continued:

> "The Home Owners Loan Act, to the extent that it permits the conversion of state associations into federal ones in contravention of the laws of the place of their creation, is an *unconstitutional* encroachment upon the reserved powers of the states. United States Constitution, Amendment 10."

The fact that Congress may create federal associations, it was said, is not important:

> "The critical question is whether along with such a power there goes the power also to *put an end to corporations created by the states and turn them into different corporations created by the nation.*" (Italics added)

And speaking of the obligation of state chartered associations to retain their status:

> "They may not divest themselves of a franchise when once it is accepted if the local statutes or decisions command them to retain it."

The court observes that Wisconsin had the right to say how such associations should be formed, supervised and dissolved but has now been told by Congress, through the statute, that its purposes are to be thwarted. This, the court holds, invades the sovereignty of Wisconsin:

> "By the challenged Act of Congress, the same associations are dissolved in other ways and for other causes, and from being creatures of the state become creatures of the Nation. In this there is an invasion of the sovereignty or quasi sovereignty of Wisconsin and an impairment of its public policy, which the state is privileged to redress as a suitor in the courts so long as the Tenth Amendment preserves a field of autonomy against federal encroachment." Hopkins Federal Savings & Loan Association vs. Cleary, supra.

Accepting subsection (r) at its full face value, it might be said to extend §75 to state court administrators regardless of state court consent. In that event it would be void by the Hopkins case, for unconstitutional encroachment is not made to depend on the state agency affected; bank commission or probate court. If the Congress may not "put an end to corporations created by the states," neither may it against state consent put an end to or suspend state laws of descent and distribution, peculiarly and exclusively subjects of state law, by admitting into bankruptcy the administrator *who has no title* and allowing him to bring along property of the heirs and withhold it against their consent three years. 11 U. S. C. A. §203 (s)(2).

And if those state creatures, building and loan associations, "may not divest themselves of a franchise when once it is accepted if the local statutes or decisions command them to retain it" neither may an administrator, no less a creature of the state and its probate court, divest himself of his franchise as administrator once accepted, being commanded now by state decision to retain it. Zion's Savings Bank and Trust Company vs. Harris, 99 Utah 464, 105 P. (2d) 461.

And if those state associations may not be dissolved by Congress through an invitation to discontinue "being

creatures of the state (and) become creatures of the Nation," neither may administrators be wooed from their probate courts by Congressional act discontinuing them as creatures of the state courts and making of them creatures in a federal forum.

Now the Supreme Court has statutory power to prescribe General Orders respecting the Bankruptcy Act. But it has no such equivalent powers regarding the Federal Home Loan Bank Act. Had it such, it might have exercised those powers and established a General Order under and to save that Act conditioning the change of charter upon state consent. But it was powerless to do so. Is it not a fair deduction then that with the Hopkins case in mind it exercised its powers in regard to bankruptcy and made General Order 50(9) so as to condition subsection (r), as to administrators, upon state court consent?

The invalidity of subsection (r) without state court consent was observed though not decided in the Utah court's reversal of the state probate court. MR. JUSTICE WOLFE in his special opinion touched upon that question thus:

> "I confess I have grave doubts as to the constitionality of subsection (r), but I do not feel that it is encumbent upon me here to resolve those doubts. If the subsection is constitutional it would, if taken literally, confer on the personal representative a power which is not dependent on the action of our courts and by his application to the bankruptcy courts it would place the property under the jurisdiction of the federal courts." In re Harris' Estate, 99 Utah 464, 105 P. (2d) 461, 467.

But the Hopkins case by the United States Supreme Court, supra, affirms that the Act, unless conditioned on state court consent, encroaches upon the agencies and powers of the state and thus by virtue of the 10th Amendment is void. The constitutional "doubts" of MR. JUSTICE WOLFE in the last quotation are thus made realistic by authority.

Hopkins Federal Savings and Loan Association vs. Cleary was by a unanimous Supreme Court (MR. JUS-

TICE CARDOZA). In reference to it later the court unanimously remarked:

> "We have no disposition to qualify what was there said." (MR. JUSTICE ROBERTS) Triegle vs. Acme Homestead Assn., 297 U. S. 189, 56 S. Ct. 408, 80 L. Ed. 575, 101 A. L. R. 1284.

This exclusive sovereignty of states over and concerning the powers of their creatures is revealed also in Federal Land Bank of St. Paul vs. Crookston Trust Company, 180 Minn. 319, 230 N. W. 797.

The Federal Farm Loan Act requires any agent who negotiates a loan for a Federal Land Bank to endorse the note and guarantee its payment. 12 U. S. C. A. §807.

A Minnesota state chartered trust company negotiated and endorsed such a loan. By declared state law of Minnesota, however, guarantees by trust companies wherein they had no beneficial interest were ultra vires.

The Land Bank sought to enforce the guarantee. But it was held unenforceable by the Minnesota Supreme Court. It approached the problem thus:

> "So we come directly to the inquiry as to whether the congress has intentionally undertaken to bestow upon state institutions added authority qualifying them to act as plaintiff's agent under the Federal Farm Loan Act. This would mean authorizing them to do that which, under the law of their creation and existence, was theretofore ultra vires."

And observed:

> "The power to create state banks and trust companies has not been delegated by the United States Constitution and hence under the terms of the Tenth Amendment thereto is reserved to the states . . . The regulation of state institutions is a right of sovereignty relative to which the Congress of the United States can have no concern."

Of the invalid effect of the Act regarding state institutions, the court concluded:

> "If it was the intention of Congress to broaden and enlarge the power of such state institutions, we think it a futile and unconstittuional effort."

The result reached accords with that in the Hopkins case. That result applies herein.

The view that subsection (r) was conditioned on state court consent was taken even before the General Order. In re Buxton (D. C. Ill.) 14 F. Supp. 646. And it was upon that authority that Judge Vaught so ruled. In re Reynolds (D. C. Okla.) 21 F, Supp. 369. Both decisions were relied upon by the Utah Supreme Court on the probate appeal. Zion's Savings Bank and Trust Company vs. Harris, 99 Utah 464, 105 P. (2d) 461.

Upon the condition of state court consent being implied in subsection (r), in re Buxton said:

> "It was not the purpose of Congress through this legislation to attempt to add to or remove limits from the power and authority conferred by a state statute upon a personal representative created solely by virtue of such statute through an order of court authorized thereon as is an administrator of an estate of a deceased person under the laws of Illinois. *Rather* it would seem that the sole purpose of Congress was to make Sections 74 and 75 of the Bankruptcy Act available to the personal representatives of deceased farmers, who by statute, will or other creating means are given sufficiently broad powers to take advantage, depending on the extent of such power, of all or any part of the provisions of said sections." (Italics added) In re Buxton, supra.

Extended to its strict and fullest implications subsection (r) bespeaks Congressional effort to invade the field of probate, exclusively the state's domain, and to adopt the instrument of that court, the administrator who has no existence apart therefrom, for its own. And this apparently against a state's consent. Thus extended, the Act violently contravenes the 10th Amendment by the Hopkins case.

On the other hand, if reason be consulted, the construction of the Act by the Illinois and Oklahoma federal courts applied before the General Order, and that prescribed within the General Order itself and arrived at by the Utah Supreme Court prevails. Thereby state court consent is impliedly requisite within subsection (r). The General Order is to that effect. General Orders are indicated as the Supreme Court's construction of the Bankruptcy Act. Zavelo vs. Reeves, 227 U. S. 625, 33 S. Ct. 365, 55 L. Ed. 676.

The result of our discussion is that subsection (r) without the qualifying interpretation accorded it by General Order 50(9) violates the 10th Amendment. The reality of that result moved the Supreme Court to promulgate the rule. This interpretation means subsection (r) and General Order 50(9) are simply beckoning gestures inviting those administrators who can become lawfully authorized by their states to enter into bankruptcy. Subsection (r) was not intended to invade a state probate code. The promulgating of the Order conclusively implies as much.

The rule of state court consent as applied to federal bankruptcy finds support in United States vs. Bekins, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137. There the Second Municipal Corporation Bankruptcy Act (11 U. S. C. A. §401) was sustained. And it was not sustained in the face of opposition by a state for California had *consented* by a statute. The Supreme Court expressly so acknowledged.

> "It is unnecessary to consider the question whether chapter 10 would be valid as applied to the irrigation district in the absence of the consent of the State which created it, *for the State has given its consent.* We think that this sufficiently appears from the statute of California enacted in 1934." (Italics added.)

And the court holds a state may lawfully consent.

> "The State is free to make contracts with individuals *and give consents* upon which the other contracting party may rely with respect to a particular use of governmental authority." (Italics added)

State consent is recognized in tax matters. Steward Mach. Co. vs. Davis, 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293. There the Social Security Act was sustained. Alabama, by its State Employment Act, complementary to the federal law inviting states to do so, *consented* to its terms. Against a taxpayer's charge of having done so, Alabama, the Supreme Court decided, had not "renounced the plenitude of power inherent in her statehood." In fact, the Supreme Court acknowledged that Alabama's "consent may be revoked."

Consent of states to federal legislation is nowadays a common thing. It has been recognized as proper to be yielded concerning acts of bankruptcy. U. S. vs. Bekins supra. General Order 50(9) as applied to subsection (r) serves to emphasize the rule. State court consent to an administrator is thereby requisite.

That probate courts of some states may yield consent and others not, cannot affect the rule. A particular bankruptcy act may lawfully lead to different results in different states. Stellwagen vs. Clum, 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507. This one expressly does so:

> "This title is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist *in its locality*, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate." (Italics added) 11 U. S. C. A. 203(s)(6).

IX.

GENERAL ORDER 50(9) APPLIES IN THIS CASE.

Appellant suggests that because the debtor died amidst the special bankruptcy proceedings under §75, General Order 50(9) does not apply; the argument being that the latter relates only to administrators who themselves would *institute* the proceedings. This is not so. There is nothing in the Order limiting it to such purpose. The words *"initiate," "institute"* or *"commence"* do not appear. The word used is "effect,"—

> "The personal representative of a deceased farmer who desires in his representative capacity to *'effect'* under Section 75 a composition or extension of the debts" etc. General Order 50(9).

Remember, the extent of Mrs. Harris' efforts had been to make an offer of composition and extension when she died (R. 3). That offer was pending at her death. Her proceedings stood in that condition at that time. No composition or extension had yet been *"effected."* None has ever been. This is admitted by appellant's brief, page 1:

> "An offer of composition and extension was made and while the matter was thus pending, on the 23rd day of November, 1938, the debtor died."

Thus when her administrator sought to reopen and enter those proceedings he was bound to accept them as they were. If he were let in, he would be obliged to take them up where Mrs. Harris had left them off—*in the midst of making an offer of composition and extension.* His efforts if permitted then, would of necessity have been to *resume* the making of that offer to *"effect"* a composition or extension. To *"effect"* either requires consent of the probate court under the General Order. And had the proceedings progressed beyond the composition stage, any effort to gain the 3 year stay within subsection (s) would of necessity have been one to *"effect"* an *extension.*

Appellant so considered. He turned to the probate court. Consent was denied him by the high state court. Pursuing that consent still higher, he turned to the Federal

Supreme Court determined to have it wrest consent from the state. But it refused. It was powerless to exact consent from an unwilling sovereign.

Appellant was thus conclusively without probate court consent. But at this point he changed his mind. He decided consent was not necessary after all. It was not, he persuaded himself, because he was not attempting to *commence* the proceedings. Mrs. Harris had already done that. He was only attempting, so he told himself, to revive.

But the General Order is not confined to a commencement. Its scope is far broader. The Utah Supreme Court and particularly MR. JUSTICE WOLFE in his special opinion on the probate appeal so held. He said:

> "I assume there is no difference between the power to *initiate* and to *revive*. Certainly if a personal representative has power to initiate he has power to revive and if it requires an order of the probate court to permit him to initiate it would also require an order to revive." (Italics added) 105 P. (2d) 461, 468.

What led the Supreme Court to promulgate the General Order? Nothing but the sound legal realism that a probate court should be consulted about what its administrator proposed to do or those proposals might be held invalid. It was nothing less. That realism applies to all proposals of administrators. And it is false to assume that the Supreme Court in this knowledge intended to ordain that an administrator seeking to *commence* a bankruptcy must gain consent of the probate court but that one endeavoring to *revive* a bankruptcy need not. The considerations which require a probate court's consent to an administrator's acts apply equally to his efforts to commence and his efforts to revive. The Supreme Court judges must have been aware of that. The word "*effect*" is appropriate in either case. In either instance the effort is one to "*effect*" a composition or extension. The General Order thus applies to both.

Even before the General Order, however, Judge Vaught ruled that an administrator could not without state court authority enter a proceedings which had been

commenced in the lifetime of the debtor. In re Reynolds (D. C. Okla.) 21 F. Supp. 369. His view thus coincides with that of Justice Wolfe supra. Both ruled that authority is necessary to revive.

In re Morgan is not authority to the contrary. *No administrator* was involved. The debtor died amidst proceedings under former §74. 11 U. S. C. A. 202-202 a. No General Order had been made. But the latter section required probate consent to "*invoke* the relief provided."

No administrator was appointed. The moving party was a creditor, the National City Bank of New York. It moved for a *receiver* because of the vacant proceedings. The case came on upon that motion. The creditor's motion was granted and a receiver appointed. The question was whether the court had power to appoint a receiver. It ruled that it had.

Thus ended the question before that court and there that judge should have stopped. But instead, he went on to explore the Act in regard to administrators notwithstanding none had been appointed and none was yet before him; and while exploring beyond the case made the statement—*purely dicta*—that consent was not required by the Act for an administrator to reopen.

The statement was pure dicta. Moreover, the sense of the word "*invoke*" employed in that Act is more accurately confined to a commencement than the broad word "*effect*" of the General Order which encompasses whole fields of action.

Chapman vs. Federal Land Bank of Louisville (6 Cir.) 117 F. (2d) 321 cited by appellant is of no benefit to him. In that case consent had actually been given. The administrator had obtained an authorizing order of the Ohio probate court. The Circuit Court of Appeals acknowledged it was powerless to investigate that order for it, that court said, was res judicata against collateral attack. This is only sensible law. When one court makes an order, another has no power to impugn it collaterally. Consequently the creditor in the Chapman case had no right to suggest that the administrator was powerless under Ohio state law.

The authorizing order of its probate court had put at rest that question.

This same question is at rest in Utah. There state law does not permit.

The General Order applies in this case. Appellant by his conduct construed it to apply. He first turned to the probate court for consent. When the State Supreme Court held it could not be given, he sought to wrest it forcibly notwithstanding, by appeal to the Federal Supreme Court. He failed. And after judgment had been entered in this case below, still clinging to that concept, appellant turned again to the probate court. He asked for its consent to this appeal. But powerless by Utah law to yield it, the probate court denied him its consent (Stipulation R. 18-19). His construction up to then; that of MR. JUSTICE WOLFE on the probate appeal and the Utah Supreme Court; our own from the beginning, and that required by the General Order—all, we submit, permit of no escape from the requirements of state court consent in every instance where an administrator would apply to a bankruptcy court, whether to commence a proceedings or to enter into one previously begun. Either effort is one to "*effect*" a composition or extension.

X.

CONCLUSION.

In conclusion let us point out again that only the bankruptcy court's order of September 30, 1941, is before this court on this appeal. Nothing else.

1. **We are not trying** the order of abatement. It was made more than three years ago, January 16, 1939 (R. 3, 14). It was never appealed and is conclusive. The time for its appeal expired February 15, 1939. And it was a proper order, too. No title had vested in the court or bankruptcy trustee as in general bankruptcy. It remained in the debtor. Miller vs. Mangus (10 Cir.) 125 F. (2d) 507, supra 29. Her death cast it upon her heirs by the Utah law of descent *instanter*. Title thereby changed. Hence, it was only proper that the proceedings be abated. But if it were not a proper order it was simply error at the most. The court had jurisdiction, and effor committed in such circumstance can be attacked only on appeal and not collaterally. Union Joint Stock Land Bank of Detroit vs. Byerly, 310 U. S. 1, 60 S. Ct. 773. Bernards vs. Johnson, 62 S. Ct. 30. Not even collaterally herein upon this appeal from another order in the same proceedings. Buttars vs. Utah Mortgage Loan Corporation (10 Cir.) 116 F. (2d) 622. Certiorari denied, 313 U. S. 572, 61 S. Ct. 958. Supra 11.

2. **We are not trying** the ill-fated probate order purporting to authorize appellant to seek a revivor. That order was made by the state probate court. It was stayed by supersedeas and reversed by the State Supreme Court on appeal, and so, was never of any legal force whatever. The United States Supreme Court acknowledged its reversal as conclusive.

3. **We are not trying** the bankruptcy court below for having dismissed the *proceedings*. The bank's motion in that respect was *denied* (R. 17-18). Appellant mistakenly complains of that alleged dismissal. The dismissal was of his first *petition;* that of February 13, 1940, to revive.

4. **We are not trying** the court below as to what it should

or could have done if anything upon its own initiative. We are not trying any of the foregoing.

5. We are trying only the final order of September 30, 1941 (R. 17-18); nothing else. And only the following parts thereof are here on trial:

> (1) *That part vacating the erroneous order of revivor previously entered by the bankruptcy court upon appellant's petition to revive based upon the invalid authority of the probate court* (R. 17-18).
>
> (2) *That part dismissing the administrator's petition to revive because of its invalid authority which left him unable by its reversal to comply with General Order* 50(9).
>
> (3) *That part rejecting for the second time the administrator's amended petition for a three year stay by subsection (s); which petition had been "deposited"* (R. 9) *previously with the clerk and already ordered* (R. 10) *not to be filed* (R. 17-18).

6. Since appellant is without authority from the probate court, his creator and proprietor apart from whom he does not exist, the bankruptcy court properly refused to receive him. A valid authority by the probate court is the first requisite of General Order 50(9). But the Probate Code of Utah does not permit of a probate court's giving that authority to its administrator, simply an instrument of that court (R. 15). Zion's Savings Bank and Trust Company vs. Harris (Utah), 99 Utah 464, 105 P. (2d) 461. Certiorari granted and dismissed. The jurisdiction and powers of probate courts and of their instruments, judges and administrators, are questions of state law. The State Supreme Court's decision upon that jurisdiction and those powers is conclusive and binds the federal courts everywhere. Supra 24.

7. State laws of descent are not suspended by the bankruptcy proceedings under §75. Thereunder title remains in the debtor at all times. Miller vs. Mangus (10 Cir.) supra. The state laws of descent attached instanter on the debtor's death and the property was cast upon her heirs accordingly. Supra 21.

8. Federal district courts and circuit courts of appeal will not assume to declare a General Order void. Only the Supreme Court may do that. Supra 28.

9. Concerning a state probate court's administrator the validity of subsection (r) depends wholly upon its construction as prescribed by General Order 50(9). That construction conditions the administrator's bankruptcy efforts on state court consent. If not impliedly conditioned thereon, subsection (r) is a trespass on the reserved powers of the sovereign State of Utah to establish and regulate state courts of justice, including probate courts, and to appoint and regulate the officers thereof, including judges and administrators. Calder vs. Bull, 14 L. Ed. 648. Rejsenhoff vs. Colonial Nav. Co., 35 F. Supp. 577. The 10th Amendment lies athwart that trespass.

A determination to adopt and make off with a state-chartered and regulated agency is an unconstitutional gesture by the Federal Government. It may not do so against the will of the state. Hopkins Federal Savings & Loan Association vs. Cleary 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 209, 100 A. L. R. 1403. An administrafor appointed and regulated exclusively under state law, by a state probate court apart from whom he cannot exist, and whose franchise is terminable at its will is clearly a state agency. Invalidity of the federal effort does not depend on the agency coveted—be it building and loan association or administrator.

Knowing this, the Supreme Court, in the exercise of its power to prescribe "all necessary . . . orders . . . for carrying the provisions of this title (bankruptcy) into force and effect" (11 U. S. C. A. §53), prescribed General Order 50(9). In so doing it indicated its construction of the Act. Zavelo vs. Reeves, 227 U. S. 625, 33 S. Ct. 365, 55 L. Ed. 676. That construction recognized subsection (r) as conditioned upon state court consent. And that construction is the sensible one. It was recognized even before the General Order. In re Buxton (D. C. Ill.) 14 F. Supp. 616. In re Reynolds (D. C. Okla.) 21 F. Supp. 369. Cf. Zion's Savings Bank and Trust Company vs. Harris, 99 Utah 464, 105 P. (2d) 461.

State consent is now fully recognized as lawful wherever it is yielded. It may be given in tax and social security matters. Steward Mach. Co. vs. Davis, 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293. And specifically regarding bankruptcy. U. S. vs. Bekins, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137.

Applying the construction of subsection (r) indicated by the Supreme Court's General Order 50(9) state court consent is requisite, and the Act is valid. It is elementary that a construction which sustains an Act must be selected over one which will annihilate it. Subsection (r) and the General Order are beckoning gestures—no more—to those administrators who can lawfully gain state court consent. Supra 36.

10. The fact that the courts of some states may yield consent and others not, cannot effect the rule. In fact, among the courts within a single state this may result. However, a particular bankruptcy act may lawfully lead to different results in different states. Stellwagen vs. Clum, 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507. This one actually does, for it directs each court to terminate the stay of subsection (s) whenever the emergency has passed "in its locality." 11 U. S. C. A. 203(s)(6), supra 37.

11. General Order 50(9) applies herein. It applies to every effort of an administrator to "*effect*" a composition or extension. It is not limited in terms to a "*commencement.*" The words "*initiate,*" "*institute*" or "*commence*" do not appear. "*Effect*" includes whole fields of action. It includes every effort by an administrator before a bankruptcy court. In Justice Wolfe's opinion on the probate appeal (105 P. (2d) 468) it was so declared. There was no difference, it was said, between the power to *initiate* and to *revive*, and that if it requires probate authority to *initiate* it requires it to *revive*. This was also the effect of Judge Vaught's decision. In re Reynolds (D. C. Okla.) 21 F. Supp. 369.

Appellant construed the General Order to this effect himself. He turned to the probate court. He even appealed to the United States Supreme Court in quest of state court consent to *revive*. And again after its denial, and even

after judgment below herein, he asked the probate court for its consent—this time to appeal this cause. Yet if consent is not requisite at the stage where an administrator applies for a revivor, because of being requisite only at the start, it cannot be required at any subsequent stage of the proceedings; not even at the stage where he appeals.

The considerations which require a probate court's consent to an administrator's acts apply equally to his efforts to *commence* or to *revive*. It is foolish to reason otherwise. An administrator may not get into bankruptcy either at the start or afterward without probate consent. The Supreme Court knows this. To argue otherwise is to deny their knowledge. The word "*effect*" is quite appropriate in every instance. It is particularly appropriate here. Any effort by the administrator, if let in, would necessarily have been to "*effect*" that composition the deceased had already offered, or on its failure, to "effect" an "extension of the debts" under subsection (s).

12. Assume for argument the order of abatement had never been made at all. The case remains the same. The administrator in such case would still have to get himself into the proceedings in place of the decedent. And to do so, like any new party to a cause, would have to petition or apply to be let in. But being an administrator he would first have to obtain authority of his creator and proprietor, the probate court, because the General Order says so. Without that authority, the General Order says, a court of bankrupty may not receive him.

Appellant tried to get into these proceedings in place of the decedent. And like new parties must, he petitioned to be let in. But he had no authority of the probate court directing him to do so. And because of that his application was denied; the court dismissing his petition to get in. This was the petition to revive (R. 4).

Thus, if the abatement had never been ordered, the case remains unchanged for the court was powerless to admit appellant without probate consent and properly refused to do so. And its order vacating the previous revivor (which had rested on appellant's unauthorized petition therefor) and rejecting appellant's amended petition under

subsection (s) was likewise proper. Hence, if the abatement had not been entered—or even were it void, and it is not—the case remains unchanged.

13. The order appealed from (1) vacating the erroneous revivor previously entered pursuant to the invalid probate order of consent; (2) dismissing appellant's petition to revive based upon that invalid consent which left him without a compliance as to General Order 50(9); and, (3) rejecting the second time his amended petition for a three year stay (subs. s) is proper in all respects. It must be sustained with costs to appellee.

Respectfully submitted,

HADLOND P. THOMAS,
Attorney for Appellee.

THOMAS & THOMAS and
DANIEL H. THOMAS
Of Counsel.

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